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# Crimes

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# Crimes

## Crimes; children in pornography

Labor Code §§1309.5, 1309.6 (new); Penal Code §§311.2, 311.4, 311.9 (amended).

AB 1580 (Ellis); STATS 1977, Ch 1061  
(*Effective September 24, 1977*)

Support: California District Attorneys Association; California Peace Officers' Association

SB 817 (Presley); STATS 1977, Ch 1148  
(*Effective September 29, 1977*)

Support: California Attorney General; California Peace Officers' Association; Motion Picture Association of America

Opposition: California Attorney's for Criminal Justice

The use of children as subjects in pornographic materials is increasing at an alarming rate, and it has been estimated that 30,000 cases of child and teenage molestation and child pornography will have occurred in 1977 in Los Angeles County alone [CAL. STATS. 1977, c. 1148, §6 at —]. Furthermore, hundreds of different magazines, books, directories, and films dealing in "kidi-porn" are currently available either on the open market, or under the counter [R. LLOYD, *FOR LOVE OR MONEY: BOY PROSTITUTION IN AMERICA* 226 (1976)]. In response to the seriousness of this situation, the legislature has enacted two new laws [CAL. STATS. 1977, c. 1061; CAL. STATS. 1977, c. 1148] that are apparently aimed at curtailing "a recent and frightening phenomenon, the criminal and sexual exploitation of children in pornography" [See *Hearings on Children in Pornography Before the California Senate Select Committee on Children and Youth*, April 1, 1977, at 4 (testimony of Joseph Freitas, District Attorney, San Francisco County)].

Prior to enactment of Chapters 1061 and 1148, there were only two misdemeanor provisions of law that dealt directly with the problem of children in pornography [CAL. STATS. 1961, c. 2147, §5, at 4428 (use of a minor in the distribution, production, and exhibition of obscene matter); CAL. LAB. CODE §1308(a)(3) (using a minor under the age of 16 for obscene or immoral purposes)]. Chapter 1148 adds provisions to the Labor Code to require all retailers and persons who knowingly sell or distribute for resale, any material that they know, or reasonably should know, depicts a minor under the age of 16 engaged in "sexual conduct" to maintain records

containing the names and addresses of the persons from whom they obtained this material [CAL. LAB. CODE §1309.5(a), (b)]. “Sexual conduct” as used in Section 1309.5 of the Labor Code includes, whether actual or simulated: sexual or anal intercourse; oral copulation; anal oral copulation; masturbation; bestiality; sexual sadism or masochism; or excretory functions or any other sexual activity performed in a lewd or lascivious manner [CAL. PENAL CODE §311.4(c)]. These records must be kept for a period of three years after acquisition of the governed material [CAL. LAB. CODE §1309.5(a), (b)]. The failure to maintain these records, or the disclosure of such records by law enforcement officers, except in the performance of their duties, is a misdemeanor [CAL. LAB. CODE §1309.5(c)] and carries a maximum civil penalty of \$5,000 [CAL. LAB. CODE §1309.6(a)]. Section 311.4 of the Penal Code provides that it is a *misdemeanor* to knowingly use a minor in the preparation, publication, distribution, or exhibition of “obscene matter” [CAL. PENAL CODE §311.4(a)]. Chapter 1148 has also amended Section 311.4 to provide that it is a *felony* to knowingly use, employ, induce, or coerce a minor under the age of 16, or for the parent or guardian having control over such a minor to knowingly permit the minor to engage in the above specified sexual conduct in the preparation of any film or photograph, or live performance, for a commercial purpose [CAL. PENAL CODE §311.4(b)]. Violation of these provisions is punishable by imprisonment in the state prison for three, four, or five years [CAL. PENAL CODE §311.4(b)].

Section 311.2 of the Penal Code, with certain exceptions for projectionists and other employees of persons licensed by a city or county, makes it a misdemeanor to possess, prepare, publish, or print, with the intent to distribute or exhibit to others, or offer to distribute, distribute, or exhibit to others “obscene matter.” [CAL. PENAL CODE §311.2(a), (c), (d)]. Chapter 1061 has added a new provision to Section 311.2 to make the above described conduct a *felony* if such conduct is performed for commercial consideration, and involves “obscene matter” that depicts a minor under the age of 18 simulating or actually engaging in sexual intercourse, masturbation, sodomy, bestiality, or oral copulation. Violation of this new provision is punishable by imprisonment in the state prison for two, three, or four years and/or a fine of \$50,000 [CAL. PENAL CODE §311.2(b)]. Thus, in an effort to halt the proliferation of “kidi-porn” in this state, it appears that the legislature has directed these changes in the law not only at the publication of film depicting children engaging in specified sexual activity, but also at those who actually use a minor, or permit a minor to be used in the production of obscene matter [See CAL. PENAL CODE §§311.2(b), 311.4(b)].

## COMMENT

Section 311.2 of the Penal Code prohibits the publication, with the intent to distribute to others, of “obscene matter” depicting a minor under the age of 18 engaging in or simulating specified sex acts [CAL. PENAL CODE §311.2(b)]. This provision does not, however, prohibit the publication of *all* matter depicting minors engaged in such sexual activity, unless it can be established that the magazine or film constitutes “obscene matter” under California law [See CAL. PENAL CODE §311.2(b)]. Section 311 of the Penal Code defines “obscene matter” as that which: taken as a whole, has, to average adults under contemporary standards, or to a clearly defined sexually deviant group, a predominant appeal to the prurient interest; clearly exceeds the customary limits of candor; and “is *utterly without redeeming social importance*” [CAL. PENAL CODE §311 (emphasis added)].

In contrast, the federal, constitutionally compelled standard for declaring matter obscene is the so-called “Miller test” set down by the United States Supreme Court in *Miller v. California* [413 U.S. 15 (1973)]. In that case, the Court reaffirmed the proposition that obscene matter does *not* fall within the constitutionally protected area of the first amendment [*Id.* at 23]. The Court in *Miller* established a tripartite test to determine whether the matter in question was obscene, and thus not protected:

- (a) *whether* “the average person, applying contemporary community standards” would find that *the work*, taken as a whole, *appeals to the prurient interest* [citation omitted]; (b) *whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law*; and (c) *whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value*. [*Id.* at 24 (emphasis added)].

Nevertheless, the California definition of “obscene matter,” which requires the prosecutor to establish that the material in question is “utterly without redeeming social importance,” is constitutional since the first amendment, as construed by the United States Supreme Court in *Miller*, does not require states to lower the prosecutorial burden of proof [Bloom v. Municipal Court, 16 Cal. 3d 71, 77, 545 P.2d 229, 232-33, 127 Cal. Rptr. 317, 320-21 (1976)].

Section 311.4 of the Penal Code prohibits the employment or use of a minor under the age of 16 in the preparation of a film or photograph, for commercial purposes, in which the minor engages in, among other things, “any lewd or lascivious sexual activity.” Although this provision indirectly prohibits publication of such material, thus raising the spectre that the above quoted provision may be unconstitutionally vague under *Miller* [See *Eagle Books, Inc. v. Reinhard*, 418 F. Supp. 345, 347-50 (N.D. Ill.) (1974)], it is quite conceivable that a court would find the provisions of Section 311.4 to

be a constitutionally permissible exercise of the state's power to regulate the "well-being of its children" without ever reaching the first amendment question [*See Prince v. Massachusetts*, 321 U.S. 158, 168 (1944); *cf. Ginsberg v. New York*, 390 U.S. 629, 634 (1968) (restricting minors' right to view pornographic material)]. Both Section 311.2 and Section 311.4 proscribe conduct that *simulates* specified sexual activity as well as actual sexual activity. Although the United States Supreme Court apparently has yet to address this issue, a California court has held that simulated sexual intercourse can constitute "hard-core pornography" and thus is not constitutionally protected speech or press [*People v. Cimber*, 271 Cal. App. 2d Supp. 367, 870, 76 Cal. Rptr. 382, 384 (1969)]. Therefore, the amendments to Sections 311.2 and 311.4 of the Penal Code appear to be consistent with the requirements of the first amendment to the United States Constitution.

A significant problem area in the new law, however, appears to be the requirement that retailers and wholesalers of any material depicting minors under the age of 16 engaged in specified sexual conduct, maintain records of the names and addresses of the persons from whom the matter was obtained [CAL. LAB. CODE §1309.5(a) (b)]. Inasmuch as it is a felony to distribute, or possess with intent to distribute, material depicting minors under the age of 18 engaged in or simulating specified sexual activity, *if such material is obscene under California law* [CAL. PENAL CODE §311.2(b)], the requirement that these retailers and wholesalers maintain records might arguably constitute compelled "testimonial self-incrimination" in violation of the fifth amendment to the United States Constitution. The United States Supreme Court has construed the term "testimony" to mean not only speech but also acts, implicit in which are statements or admissions [*Fisher v. United States*, 325 U.S. 391, 410-11 (1976)]. Consequently, it is arguable that the act of keeping records pursuant to Section 1309.5 of the Labor Code involves implicit testimony that the individual who maintains these records is probably committing a felony, the distribution of obscene matter depicting minors engaged in specified sexual conduct [*Compare* CAL. PENAL CODE §311.2(b) *with* CAL. LAB. CODE §1309.5(a)-(b)]. From this premise it is conceivable that a court reviewing the provisions of Section 1309.5 may find these record keeping requirements to constitute "'real and appreciable,' hazards of self-incrimination" [*Compare* CAL. LAB. CODE §1309.5(a)-(b) *with* *Marchetti v. United States*, 390 U.S. 39, 48 (1968)].

In *Albertson v. SACB* [382 U.S. 70 (1966)], the United States Supreme Court suggested, in effect, that if a regulation is directed "at a highly selective group inherently suspect of criminal activities" and if compliance with the regulation might involve the individual "in the admission of a crucial element of a crime," then that regulation is violative of the individu-

al's fifth amendment right against self-incrimination [*Id.* at 79]. While there do not appear to be any United States Supreme Court cases directly on point, it would seem that the record keeping requirement of Labor Code Section 1309.5 is somewhat analogous to the issues considered by the Court in the *Albertson* case. It is arguable that this record keeping requirement might constitute compelled "testimonial self-incrimination" amounting to the admission of a crime, and, therefore, may be unconstitutional [*Compare* CAL. LAB. CODE §1309.5(a), (b) and CAL. PENAL CODE §311.2 with *Byers v. California*, 402 U.S. 424, 427-31 (1971), *Haynes v. United States*, 390 U.S. 85, 95-100 (1968), *Grosso v. United States*, 390 U.S. 62, 64-69 (1968), *Marchetti v. United States*, 390 U.S. 39, 48-49 (1968) and *Albertson v. SACB*, 382 U.S. 70, 77-79 (1966)]. The apparent unconstitutionality of Labor Code Section 1309.5, however, will not affect any other provisions of the new law, since Chapter 1148 provides that its provisions are severable [Cal. Stats. 1977, c. 1148, §4, at—]. In summary, although the provisions of the new law appear to be consistent with the requirements of the first amendment, the record keeping requirement of Labor Code Section 1309.5 is arguably violative of the fifth amendment.

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**See Generally:**

- 1) *Jenkins v. Georgia*, 418 U.S. 153 (1974).
- 2) B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Decency and Morals* §§550-52 (obscenity and related offenses) (Supp. 1975).

## **Crimes; terrorist threats**

Penal Code §§422, 422.5 (new).

SB 923 (Carpenter); STATS 1977, Ch 1146

Support: California Peace Officers' Association; Pacific Gas and Electric Company; San Francisco Board of Supervisors

Opposition: California Attorneys for Criminal Justice

Prior to the enactment of Chapter 1146, it was unclear under what conditions the communication of terrorist threats was unlawful [*See, e.g.* CAL. PENAL CODE §§69, 71, 95, 136, 148.1]. Modelled after the Model Penal Code [MODEL PENAL CODE §211.3, (Proposed Official Draft, 1962)] and the Brown Commission Report [NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT OF THE NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS §1614 (1971)], Chapter 1146 adds Sections 422 and 422.5 to the Penal Code to make it a felony to willfully threaten to commit certain crimes under specified circumstances [CAL. PENAL CODE §422].

Section 422 makes it illegal to willfully threaten to commit a crime that will result in death or great bodily injury to another person. The new law provides, however, that the act must have been committed with the specific

intent to terrorize another person, or with reckless disregard of the risk of terrorizing another [CAL. PENAL CODE §422]. Furthermore, to be prohibited by Section 422, the result of the conduct must be: (1) to cause the other person reasonably to be in sustained fear for his or her, or his or her immediate family's safety; (2) to cause the evacuation of a building, a place of assembly, or a facility used in public transportation; (3) to interfere with essential public services; or (4) to otherwise cause serious disruption of public activities. Thus, the effect of the new law is to focus on the harm done by the threats [See CAL. PENAL CODE §422]. Punishment for violation of Chapter 1146 is imprisonment in any state prison for 16 months, or two or three years as applicable under the Uniform Determinate Sentencing Act [Compare CAL. PENAL CODE §422 with CAL. PENAL CODE §18]. Inasmuch as the language of Chapter 1146 reflects that of the Model Penal Code and the Brown Commission Report, it would appear that the intent of Chapter 1146 is to prevent serious alarm caused by the acts of terrorists [Compare CAL. PENAL CODE §422 with MODEL PENAL CODE §211.3, Status of Section (Proposed Official Draft, 1962) and NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT OF THE NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS §1614, Comment (1971)]. This conclusion also would appear reasonable in light of the recent wave of terrorist attacks on California utilities' installations [See Los Angeles Times, Apr. 19, 1977, §1, at 2, col. 5; Los Angeles Times, Apr. 12, 1977, §1, at 2, col. 5; Los Angeles Times, Jan. 28, 1977, §1, at 3, col. 6].

A brief discussion of the specific language used in Chapter 1146 should provide some insight into the possible construction of this new law. The term "willfully" as used in Section 422 appears to require only a showing that a defendant possessed a purpose or willingness to make the threat and not to require proof of an intent to violate the law [Compare CAL. PENAL CODE §422 with *People v. Atkins*, 53 Cal. App. 3d 348, 358, 125 Cal. Rptr. 855, 861 (1975) and *People v. Mancha*, 39 Cal. App. 3d 703, 722, 114 Cal. Rptr. 392, 403-04 (1974) and CAL. PENAL CODE §7]. A threat, on the other hand, may be defined as the communication of an intent to inflict physical or other harm on any person or property [See *People v. Massengale*, 261 Cal. App. 2d 758, 765, 68 Cal. Rptr. 415, 419-20 (1968); *People v. Oppenheimer*, 209 Cal. App. 2d 413, 422, 26 Cal. Rptr. 18, 25 (1962)]. Whether words or phrases are harmless or threatening is determined by "the context in which they are used, measured by the common experience of the society in which they are used" [United States v. Pennell, 144 F. Supp. 317, 319 (N.D. Cal. 1956); see *Roy v. United States*, 416 P.2d 874, 878 (9th Cir. 1969)]. Thus, the phrase "willfully threatens" appears to require a showing that the defendant purposefully communicated an intent to harm any person or property [See CAL. PENAL CODE §422].

Conviction under Section 422 also requires proof of a specific intent to terrorize another, or commission of the proscribed act with reckless disregard of the risk of terrorizing another. Since the use of the term “terrorize” is new to the California Penal Code, Section 422.5 has defined the term as meaning “to create a climate of fear and intimidation by means of threats of violent action causing sustained fear for personal safety in order to achieve social or political goals.” This definition would appear to be consistent with definitions of the term developed by other states with terrorist threat statutes similar to the new California law [*Compare* CAL. PENAL CODE §§422, 422.5 *with* *Armstrong v. Ellington*, 312 F. Supp. 1119, 1126 (W.D. Tenn. 1970) *and* *State v. Gunzelman*, 210 Kan. 481, 489, 502 P.2d 705, 710 (1972) *and* *State v. Schweppe*, 306 Minn. 395, 401, 237 N.W.2d 609, 614 (1975)], and the meaning of the term as it is used in the Model Penal Code [*Compare* CAL. PENAL CODE §§422, 422.5 *with* MODEL PENAL CODE §211.3, Status of Section (Proposed Official Draft, 1962) *and* §211.3, Comment (Tent. Draft No. 11, 1960)].

As an alternative to the specific intent requirement of Chapter 1146, Section 422 also extends criminal sanctions to terrorist threats if they are made “with reckless disregard of the risk of terrorizing another.” The term “reckless disregard” is not defined by Chapter 1146, but has been used in previous California codes [*See* CAL. STATS. 1959, c. 1189, §1, at 3276; CAL. STATS. 1941, c. 279, §1, at 1414]. Thus, an examination of cases construing these other uses of the term may prove helpful. Generally, to establish “reckless disregard,” there must be an action that the perpetrator knew or should have known was likely to cause harm [*See* *Breceda v. Gamsby*, 267 Cal. App. 2d 167, 177, 72 Cal. Rptr. 832, 840 (1968) (employment of workmen under dangerous conditions that can be guarded against constitutes a reckless disregard for their safety)].

Additionally, a “reckless disregard” would appear to reflect a type of conduct that is quasi-criminal in nature [*People v. Young*, 20 Cal. 2d 832, 837, 129 P.2d 353, 356 (1942) (reckless driving and negligent homicide)], which is to say that the defendant was aware of the possible results, but continued with his or her course of conduct [*See* *People v. Allison*, 101 Cal. App. 2d Supp. 932, 934-35, 226 P.2d 85, 86 (1951) (reckless driving); *People v. Gomez*, 59 Cal. App. 2d 417, 419-20, 138 P.2d 788, 789 (1943) (negligent homicide in a vehicle)]. Furthermore, it appears that whether an act is done with “reckless disregard” is a question of fact to be decided by the jury [*See* *Hastings v. Serleto*, 61 Cal. App. 2d 672, 683, 143 P.2d 956, 961 (1943) (reckless driving); *People v. Murray*, 58 Cal. App. 2d 239, 244, 136 P.2d 389, 391 (1943) (negligent homicide in a vehicle)]. Thus, conviction under Chapter 1146 for making the proscribed threats with reckless disregard of the risk of terrorizing another would appear to require a



showing that the defendant was aware, or should have been aware, of a probable risk, yet ignored that probability and proceeded with his or her course of conduct [*Compare* CAL. PENAL CODE §422 *with* *Morgan v. Southern Pacific Trans. Co.*, 37 Cal. App. 3d 1006, 1011-12, 112 Cal. Rptr. 695, 698 (1974) (negligence action in tort for damages) *and* *People v. Thurston*, 212 Cal. App. 2d 713, 716, 28 Cal. Rptr. 254, 256 (1963) (reckless driving) *and* *People v. Schumacher*, 194 Cal. App. 2d 335, 339-40, 14 Cal. Rptr. 924, 926-27 (1961) (reckless driving)].

Although Chapter 1146 makes it a crime to communicate a threat directly, the language of the new law apparently does not preclude prosecution for threats indirectly communicated [*See* CAL. PENAL CODE §422]. It should be noted, however, that the California Legislature considered, but did not enact a related measure that would have specifically proscribed directly or indirectly threatening any person with unlawful injury in order to force that person to act or refrain from acting in performance of his or her vocational or professional responsibilities [*See* SB 1129, 1977-78 Regular Session, *as amended*, June 16, 1977]. It is not clear whether the failure to enact a provision containing this language indicates an intent by the legislature *not* to prohibit indirect threats, or a belief that the language incorporated in Chapter 1146 includes a proscription of such threats. In support of the latter interpretation, other states with threat statutes similar to California's have found that to violate these laws the threat need not be communicated directly in cases in which the threat is clear from the conduct of the defendant [*State v. Schweppe*, 306 Minn. 395, 399-401, 237 N.W.2d 609, 612-14 (1975); *see* *Gurley v. United States*, 308 A.2d 785, 786-87 (D.C. App. 1973); *State v. Lizotte*, 256 A.2d 439, 440, 442 (Me. 1969)]. Consistent with these cases, Chapter 1146 appears to focus on the effects of a defendant's actions (i.e., reasonable fear, evacuation, public disruption) thereby apparently indicating that the conduct sanctioned by Section 422 of the Penal Code is that in which a threat to kill or to inflict great bodily injury is clear regardless of how such a threat is communicated to an individual [*See* CAL. PENAL CODE §422(a)-(d)]. Thus, the language of Chapter 1146 prohibits purposefully communicating, either directly or indirectly, a threat to commit a crime that will result in death or great bodily injury to another person [*See* CAL. PENAL CODE §422].

Although similar statutes in other states have been constitutionally challenged on the basis of freedom of speech, vagueness, and overbreadth, these laws have been consistently upheld [*Masson v. Slaton*, 320 F. Supp. 669, 673 (N.D. Georgia 1970); *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771, 773 (1975); *State v. Gunzelman*, 210 Kan. 481, 489, 502 P.2d 705, 710 (1972); *State v. Hotham*, 307 A.2d 185, 186 (Me. 1973)]. Based upon the specific intent requirement of Chapter 1146, and the restrictive definition of

“terrorize,” it would appear that Chapter 1146, if challenged, will also be found to be constitutional [*Compare* CAL. PENAL CODE §§422, 422.5 *with* *Masson v. Slaton*, 320 F. Supp. 669, 672 (N.D. Georgia 1970) *and* *Erlich v. Municipal Court*, 55 Cal. 2d 553, 559, 360 P.2d 334, 337, 11 Cal. Rptr. 758, 761 (1961) *and In re Davis*, 242 Cal. App. 2d 645, 664, 51 Cal. Rptr. 702, 715 (1966) *and* *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771, 772 (1975) *and* *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705, 710 (1972) *and* *State v. Hotham*, 307 A.2d 185, 186 (Maine 1973)].

In summary, Chapter 1146 makes it unlawful to willfully threaten to commit certain crimes for the purpose of terrorizing another or in reckless disregard of the risk of terrorizing another [CAL. PENAL CODE §422]. Furthermore, the result of any of these acts must be to cause “another person reasonably to be in sustained fear for his or hers or their immediate family’s safety,” or to cause the evacuation of certain buildings or places, or interfere with essential public services or other public activities [*See* CAL. PENAL CODE §422]. Assuming Chapter 1146 will survive any constitutional challenge, it would appear to provide California with an effective tool to deal with terrorist threats.

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**See Generally:**

- 1) Annot., 58 A.L.R. 3d 533 (terrorist threat statutes) (1974).
- 2) Annot., 93 A.L.R. 2d 304 (bomb hoaxes and false reports) (1964).

## Crimes; witnesses

Penal Code §137 (amended).

AB 269 (Greene); STATS 1977, Ch 67

Support: California Attorney General; California District Attorneys’ Association; California Peace Officers’ Association

Chapter 67 has amended Section 137 of the Penal Code to make it a misdemeanor to knowingly induce a person to give false testimony or to withhold true testimony [CAL. PENAL CODE §137(c)]. In addition, it remains a felony to offer, promise to give, or give a bribe to a witness or a person about to be called as a witness [CAL. PENAL CODE §137(a)], or to attempt by force, threat of force, or use of fraud to induce a person to give false testimony or withhold true testimony [CAL. PENAL CODE §137(b)]. Thus, whereas it remains a more serious crime to bribe a witness or to attempt to induce a change of testimony by force or fraud [CAL. PENAL CODE §137(a)-(b)], Chapter 67 now additionally makes it illegal to knowingly *induce* a witness by any other means to change his or her testimony [*See* CAL. PENAL CODE §137(c)].

The meaning of “induce,” as used in Section 137(c), appears to be unclear. It seems uncertain whether Section 137(c) is violated only when a

person successfully induces a witness to give false or withhold true testimony, or whether an attempt at such inducement is sufficient for a violation of this subsection. Pursuant to Chapter 67, Section 137(c) provides that "every person who knowingly *induces* another person *to give* false testimony . . . is guilty of a misdemeanor" (emphasis added). In contrast, Section 137(b) uses the language "every person who *attempts* by force or threat of force or by the use of fraud *to induce* any person to give false testimony . . . is guilty of a felony" (emphasis added). This difference in language appears to imply that a prospective witness must actually give false or withhold true testimony and that merely an unsuccessful attempt to induce this result is insufficient for conviction under Section 137(c). The Attorney General of California has noted that the phrase "to induce" means "among other things, 'to influence to an act or course of conduct' " [58 OP. ATT'Y GEN. 320 (1975)]. Arguably, the inference may be drawn that a completed course of conduct is required. Other cases have used broader definitions allowing the inference that only an attempted interference is required, but the facts of these cases all involved a completed rather than an attempted interference [*See* *IBEW v. NLRB*, 341 U.S. 694, 697, 701-02 (1951); *Aluminum Extrusion Co. v. Soule Steel Co.*, 260 F. Supp. 221, 224 (C.D. Cal. 1966); *People v. Drake*, 151 Cal. App. 2d 28, 34, 38-39, 310 P.2d 997, 1000, 1003 (1957)]. Indeed, the historical purpose of Section 137, which is to prevent corrupt interference with the administration of justice [*People v. McAllister*, 99 Cal. App. 37, 40, 277 P. 1082, 1084 (1929)], would appear to suggest that only an attempted interference is necessary. On the other hand, the mere solicitation of perjury is already prohibited by Section 653f of the Penal Code. Thus, based on the contrasting language of Sections 137(b) and 137(c) and the historical usage of the word "induce," it appears that there is a strong argument to construe Section 137(c) to require a showing that false testimony was given or true testimony was withheld.

If a person succeeds in inducing another to give false testimony by using force, threat of force or fraud, Section 663 of the Penal Code would appear to allow prosecution of this act as an attempt, which is punishable as a felony pursuant to Section 137(b), since a completed inducement necessarily involves such an attempt. Section 137(c), however, indicates that the successful inducement of a prospective witness to change his or her testimony is a misdemeanor. Thus, the language of Section 137(b) seems to indicate that the attempted inducement by use of force, threat of force or use of fraud is a felony, whereas the completed inducement, pursuant to Section 137(c), is a misdemeanor. The apparent intent of Chapter 67, however, is to treat any inducement of a witness, attempted or successful, as a felony if done with force, threat of force or by the use of fraud [*See* CAL. PENAL

CODE §137(b)]. Any other successful inducement knowingly made would appear to be a misdemeanor under Section 137(c). Thus, Chapter 67 would now appear to provide a deterrent to *any* conduct that by design induces a witness to give false testimony or withhold true testimony and to clarify the language governing such conduct [*See* CAL. PENAL CODE §137].

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See Generally:

- 1) 2 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Governmental Authority* §§815, 816, 826 (bribery of witnesses) (1963), §815 (force or threat of force) (Supp. 1975).

## Crimes; cohabiting persons—domestic violence

Penal Code §273.5 (new); §273d (amended).

SB 691 (Marks); STATS 1977, Ch 912

Support: National Organization of Women

Chapter 912 has amended Section 273d of, and added Section 273.5 to the Penal Code to separate provisions relating to child abuse and wife beating, respectively. In addition, the provisions of Section 273d (now Section 273.5), which formerly made it a felony for a husband to beat his wife [CAL. STATS. 1976, c. 1139, §166, at — ] have been amended to prohibit such conduct by *either* spouse or by cohabiting persons of the opposite sex [CAL. PENAL CODE §273.5].

Under California law, in order for a police officer to make an arrest without a warrant, the crime must either have been committed in his or her presence or the officer must have reasonable cause for believing that the person to be arrested has committed a felony [CAL. PENAL CODE §836]. Although “wife beating” necessarily includes a battery [*See* CAL. PENAL CODE §§243, 273.5], such an offense is not a felony unless the victim has suffered “serious bodily injury,” which is defined as a “*serious* impairment of physical condition” [CAL. PENAL CODE §243 (emphasis added)]. Section 273.5, on the other hand, provides that it is a felony to inflict “corporal injury resulting in a traumatic condition,” which is defined as a wound or other injury to the body caused by external violence [*Compare* CAL. PENAL CODE §273.5 with *People v. Burns*, 88 Cal. App. 2d 867, 873, 200 P.2d 134, 137-38 (1948)]. Thus, a police officer at the scene of a domestic disturbance who is able to observe such wounds or injuries on an individual and has reason to believe that they were inflicted by the person’s spouse or the person with whom the injured individual is cohabiting, apparently is now allowed to make an arrest pursuant to Section 273.5 for the protection of the battered individual [*See People v. Cameron*, 53 Cal. App. 3d 786, 792-93, 126 Cal. Rptr. 44, 47-48 (1975); CAL. PENAL CODE §836].

Section 273.5 also punishes as a felony the beating of a person of the

opposite sex with whom one is "cohabiting." Furthermore, this section makes it clear that it is *not* necessary to hold oneself out as being married in order to constitute cohabitation. It is well settled that the term "cohabitation" has the meaning of "living together as husband and wife" [Kusior v. Silver, 54 Cal. 2d 603, 611, 354 P.2d 657, 661, 7 Cal. Rptr. 129, 133 (1960); Louis v. Louis, 7 Cal. App. 3d 851, 852, 86 Cal. Rptr. 834, 835 (1970)], while holding oneself out to be married has been defined as representing oneself to the *public* as being married, which includes, for example, using the same last name on a joint checking account or having a joint listing in the telephone directory [Lang v. Superior Court, 53 Cal. App. 3d 852, 859, 126 Cal. Rptr. 122, 126-27 (1975)]. Thus it would seem that the legislature intends the term "cohabitation" to be given a broad interpretation by the courts.

Chapter 912 has been enacted in an apparent response to the rising number of couples who are living together without being married [Marvin v. Marvin, 18 Cal. 3d 660, 665 n.1, 557 P.2d 106, 109 n.1, 134 Cal. Rptr. 815, 818 n.1 (1976)] and to the comments of the court in *People v. Cameron* [53 Cal. App. 3d 786, 126 Cal. Rptr. 44 (1975)], which suggested that the legislature amend former Section 273d, now Section 273.5, to include both spouses within its protection [*Id.* at 797, 126 Cal. Rptr. at 51]. Consequently, Section 273.5 would appear to broaden the prohibition against wife beating by also punishing as a felony any person who inflicts a traumatic injury on his or her spouse or upon the person of the opposite sex with whom they are cohabiting and to enhance the enforcement of this law by apparently allowing a police officer to make a warrantless arrest for violations of this section not committed in his or her presence.

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See Generally:

- 1) 1 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against the Person*, §274 (injury to the wife) (1963).

## Crimes; arson—solicitation and punishment

Penal Code §456 (new); §653f (amended).

AB 27 (Arnett); STATS 1977, Ch 163

Support: California Attorney General; California District Attorneys' Association; California Fire Chiefs' Association; California Peace Officers' Association; Farmers Insurance Group; State Bar of California

In an apparent response to the growing problem of arson in California [See Assemblyman Dixon Arnett, Press Release, No. 77-6, January 17, 1977], Chapter 163 has been enacted to make it a crime to solicit another person to commit arson [CAL. PENAL CODE §653f]. Under prior law, solicitation of arson was not, of itself, a crime [See CAL. STATS. 1976, c.

1139, §263 at — ]. If, however, the party solicited agreed to commit the crime and there was some overt act in furtherance of the agreement, such conduct is sufficient to prove conspiracy [CAL. PENAL CODE §§182, 184]. Furthermore, if the solicited offense is completed, the solicitor is punishable as a principal in the crime [CAL. PENAL CODE §31]. The crime of solicitation, on the other hand, is separate and distinct from conspiracy since solicitation is punishable regardless of actions of the solicited party [1 B. WITKIN, CALIFORNIA CRIMES, *Solicitation* §§76-77 (1963)].

Penal Code Section 653f makes it a felony/misdemeanor to solicit another person to commit specified crimes and, in addition to imprisonment, subjects persons convicted under its provisions to a fine not to exceed \$5,000. Chapter 163 has amended Section 653f to include arson in the list of offenses for which it is a crime to solicit and also provides that the fine for solicitation of the enumerated offenses may now exceed \$5,000 if such amount could have been assessed for the commission of the completed crime. Since Section 456 has been added to the Penal Code to allow the imposition of a fine of up to \$50,000, in addition to the terms of imprisonment already prescribed by law, for felony arson convictions, it would appear that this maximum fine may now be assessed against a person convicted of solicitation of arson [See CAL. PENAL CODE §§456, 653f]. Although Penal Code Section 653f does not define the term “arson,” it generally is said to include the burning of dwellings, trailer coaches, and other buildings [See *People v. Chavez*, 50 Cal. 2d 778, 787, 329 P.2d 907, 912-13 (1958); CAL. PENAL CODE §§447a, 448a; 1 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Property* §464 (1963)]. The burning of personal property, however, has been held not to be arson [*People v. Nichols*, 3 Cal. 3d 150, 161, 474 P.2d 673, 680, 89 Cal. Rptr. 721, 728 (1970), *cert. denied*, 402 U.S. 910 (1971); 1 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Property* §463 (Supp. 1975)] and the sections proscribing malicious burning specifically provide that they apply either to objects “not the subject of arson” [CAL. PENAL CODE §449b] or only to the burning of crops, grass, or timber [CAL. PENAL CODE §449c]. Therefore, although Chapter 163 makes it a crime to solicit another person to commit arson [CAL. PENAL CODE §653f], and increases the maximum assessable fine for felony arson convictions and solicitation of arson to \$50,000 [CAL. PENAL CODE §§456, 653f], its provisions are apparently limited to the burning of buildings.

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See Generally:

- 1) 1 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Property* §§463-469 (1963), §§463-469 (Supp. 1975).
- 2) 1 B. WITKIN, CALIFORNIA CRIMES, *Solicitation* §§76, 77 (1963).

## Crimes; burglary, arson, and discharge of firearms—house cars and campers

Penal Code §§246, 447a, 459 (amended).

SB 305 (Johnson); STATS 1977, Ch 690

Support: California Attorney General; California Highway Patrol; California Organization of Police and Sheriffs; California Peace Officer's Association

Chapter 690 has been enacted to specifically include inhabited campers, as defined by Section 243 of the Vehicle Code, and house cars, as defined by Section 362 of the Vehicle Code, within the list of structures that can be the subject of a felony discharge of a firearm, a burglary, or an arson. Formerly, Section 246 and 459 of the Penal Code provided that a vehicle, *inter alia*, could be the subject of a felony discharge of a firearm or of a burglary, respectively [See CAL. STATS. 1976, c. 1119, §1, at —; CAL. STATS. 1947, c. 1052, §1, at 2452], which arguably included campers and house cars within these provisions [See CAL. VEH. CODE §670]. Section 246 has been amended to specifically provide that for a house car or camper to be the subject of a felony discharge of a firearm, it must be inhabited, which means that the vehicle must be currently in use as a dwelling, although not necessarily occupied [CAL. PENAL CODE §246]. Similarly, Section 459 has been amended to provide that for a camper to be the subject of a burglary, it must also be in use as a dwelling, but the new law does not require that a house car be inhabited to be included in this section [See CAL. PENAL CODE §459].

The malicious burning of motor vehicles is proscribed by Section 449a of the Penal Code, and is punishable by imprisonment in the state prison for 16 months, two, or three years [CAL. PENAL CODE §§18, 449a]. Chapter 690, however, has now added *inhabited* campers and *inhabited* house cars to the list of structures that can be the subject of arson, which is punishable by imprisonment in a state prison for two, three, or four years [CAL. PENAL CODE §447a]. In summary, Chapter 690 has increased the penalty for the malicious burning of a house car or camper, if inhabited, and has limited the situations in which campers can be the subject of a burglary, and in which house cars and campers can be the subject of felony discharge of a firearm.

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### See Generally:

- 1) 1 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Property* §475 (vehicles, highways and bridges, etc.) (1963), §§451-66 (nature of crime—burglary, arson) (Supp. 1975).

## Crimes; brandishing a firearm

Penal Code §417 (amended).

AB 405 (Maddy); STATS 1977, Ch 667

Support: California Association of Highway Patrol Officers; California District Attorneys' Association; California Peace Officers' Association;

California State Employees' Association; California Probation, Parole and Correctional Association

Opposition: State of California Public Defender

Section 417 of the Penal Code makes it a misdemeanor, except in cases of self-defense, to draw or exhibit in the presence of another a loaded or unloaded firearm or any other deadly weapon in a rude, angry or threatening manner, or to use such a weapon unlawfully in any fight or quarrel [CAL. PENAL CODE §417(a)]. Chapter 667 has amended Section 417 by adding a provision making it a felony to brandish a firearm in such a manner in the immediate presence of a peace officer [CAL. PENAL CODE §417(b)]. Thus, it is a more serious crime to draw or exhibit a firearm, whether loaded or unloaded, in a rude, angry or threatening manner in the immediate presence of a peace officer if: (1) the person knows or reasonably should know that the other is a peace officer in the performance of his or her duties; and (2) the peace officer is actually engaged in the performance of his or her duties [See CAL. PENAL CODE §417(b)]. Punishment for violation of Section 417(b) is imprisonment in a county jail for not more than one year, or in a state prison for 16 months, or two or three years pursuant to the Uniform Determinate Sentencing Act [See CAL. PENAL CODE §18].

To be liable under the felony provision of Section 417, a defendant must have exhibited a firearm in the *immediate* presence of the peace officer [CAL. PENAL CODE §417(b)]. Although not defined by prior cases prosecuted under Section 417, the term "immediate presence" has been construed in relation to the crime of robbery [CAL. PENAL CODE §211] to mean at least an area within which the victim could reasonably be expected to exercise some physical control over his or her property [People v. Bauer, 241 Cal. App. 2d 632, 642, 50 Cal. Rptr. 687, 693 (1966)]. In contrast, the phrase "in the presence of a peace officer" generally has been broadly construed to depend on the circumstances of each case and includes perceptions by the use of all the senses [People v. Goldberg, 2 Cal. App. 3d 30, 33, 82 Cal. Rptr. 314, 316 (1969)]. Thus, the language "immediate presence" would appear to require that the brandishing of a firearm occur within physical proximity of the peace officer [See CAL. PENAL CODE §417(b)].

As used in Section 417, the term "peace officer" refers to any of the following persons provided they are regularly employed and paid in their capacities as: sheriffs, deputy sheriffs, undersheriffs, police, marshalls, deputy marshalls, constables, deputy constables, California Highway Patrolmen, California State Police, certain members of the California National Guard, members of state university or college police departments, and correctional, parole and probation officers [See CAL. PENAL CODE §§417(b), 830.1, 830.2(a)-(e), 830.5]. Apparently the term "peace officer" does *not* include the particular officers enumerated in Section 830.3, securi-



ty officers, reserve or auxiliary sheriffs, or reserve or auxiliary city policemen [See CAL. PENAL CODE §§417(b), 830.3, 830.4, 830.6]. Thus, whereas it is already a misdemeanor to brandish a *firearm* or *any other deadly weapon* in the presence of any other person [CAL. PENAL CODE §417(a)], Chapter 667 now provides a stiffer penalty for drawing or exhibiting a *firearm* in the immediate presence of a peace officer who is acting in the line of duty [CAL. PENAL CODE §417(b)].

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See Generally:

- 1) 2 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Public Peace and Welfare* §621 (disturbing the peace) (1963).

## Crimes; unlawful flight by a motor vehicle operator

Vehicle Code §2800.1 (new); §§40000.7, 42001 (amended).

SB 200 (Presley); STATS 1977, Ch 1104

Support: California District Attorneys' Association; California Highway Patrol; California Peace Officers' Association

Prior to the enactment of Chapter 1104, there apparently was no law specifically prohibiting the high speed pursuit situation between an arresting police officer and a driver who was willfully fleeing from the officer [See CAL. VEH. CODE §§2800, 23103, 23104]. Section 2800 of the Vehicle Code is limited to disobedience of "traffic officers," which is defined as any member of the California Highway Patrol, or any peace officer who is on duty for the primary purpose of enforcing the provisions of the "Accidents and Accident Reports" and "Rules of the Road" division of the Vehicle Code [Compare CAL. VEH. CODE §2800 with CAL. VEH. CODE §625 and CAL. PENAL CODE §830]. Further, the sections of the Vehicle Code pertaining to reckless driving require a showing of "willful or wanton disregard for the safety of persons or property" [CAL. VEH. CODE §23103; see CAL. VEH. CODE §23104].

As supported by the California Peace Officers' Association, Chapter 1104 adds Section 2800.1 to the Vehicle Code in an apparent effort to deter high speed pursuits [See Letter from A. Zaremberg, California Peace Officers' Association, to State Senator R. Presley, December 14, 1976, (copy on file at the *Pacific Law Journal*) by making it unlawful for a motor vehicle operator to flee from a peace officer pursuing in a marked car [See CAL. VEH. CODE §2800.1]. Thus, Chapter 1104 provides that once a motorist has heard a siren *and* has seen at least one red light emanating from a distinctively marked or painted vehicle that is operated by a member of the California Highway Patrol or any peace officer of any sheriff's or city police department, the motorist is guilty of a misdemeanor if he or she, with the intent to evade the officer: (1) willfully disregards such a siren *and* flashing

light; *and* (2) flees, or otherwise attempts to elude, the pursuing peace officer's motor vehicle [CAL. VEH. CODE §2800.1]. A further requirement of Section 2800.1 is that the pursuing officer must be wearing a complete, distinctive peace officer's uniform and appropriate badge [CAL. VEH. CODE §2800.1]. In addition, the language "every person who . . . hears a siren and sees at least one lighted lamp exhibiting a red light" [CAL. VEH. CODE §2800.1] would appear to require expressly that the fleeing motorist *actually* hear the siren *and* see the red light, rather than be in a position where he or she should have heard one and seen the other [See CAL. VEH. CODE §2800.1]. Arguably, the language "at least one lighted lamp exhibiting a red light" would appear to encompass both solid and flashing red lights [See CAL. VEH. CODE §2800.1]. Subsequent language in Section 2800.1, however, refers to the willful disregard of "such siren and *flashing* light" (emphasis added). Thus, it would appear to be ambiguous whether the willful disregard of a solid burning red light, emanating from the appropriate vehicle, would be a violation of Section 2800.1. Furthermore, the requirement that the patrol car be distinctively marked apparently would make Chapter 1104 inapplicable to high speed pursuits by the specified officers in *unmarked* cars [See CAL. VEH. CODE §2800.1].

Referring to the language of Section §2800.1, it appears that the term "willfully" is afforded the same meaning as provided for in the Penal Code [Compare CAL. PENAL CODE §7 with CAL. VEH. CODE §§2800, 23103, 27156 and *People v. Norman*, 14 Cal. 3d 929, 932, 934, 538 P.2d 237, 239, 241, 123 Cal. Rptr. 109, 111, 113 (1975) and *People v. Schumacher*, 194 Cal. App. 2d 335, 340, 14 Cal. Rptr. 924, 927 (1961) and *People v. McNutt*, 40 Cal. App. 2d Supp. 835, 837-38, 105 P.2d 657, 658-59 (1940)]. Thus, the term "willfully disregards" apparently will require a showing that the fleeing motorist simply possessed a purpose or willingness to ignore the officer's signals and will not require proof of any intent to violate the law [See CAL. PENAL CODE §7]. The requirement remains, however, that the motorist act with the intent to evade the pursuing officer [CAL. VEH. CODE §2800.1].

Procedurally, unless a motorist refused to give his or her written promise to appear or demanded an immediate appearance before a magistrate, the pursuing officer is apparently not authorized to take a fleeing motorist before such magistrate, but rather seems limited to giving the motorist a written notice to appear in court [Compare CAL. VEH. CODE §40500 with CAL. VEH. CODE §§40302, 40303]. Punishment upon a first conviction of a violation of Vehicle Code Section 2800.1 is a fine not exceeding \$50 or imprisonment in a county jail for five days or less [CAL. VEH. CODE §42001(b)]. A second conviction within one year is punishable by a fine not to exceed \$100 or by imprisonment in a county jail not in excess of ten days,

or by both [CAL. VEH. CODE §42001(b)]. A third or any subsequent conviction within a one year period is punishable by a fine not exceeding \$500 or by imprisonment in a county jail for a period not exceeding six months, or by both [CAL. VEH. CODE §42001(b)].

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See Generally:

- 1) Comment, *California's Ineffective Reckless Driving Statute*, 14 HASTINGS L.J. 415 (1962-63) (problems with obtaining convictions under the reckless driving statute).

## Crimes; unlawful lodging in vehicles

Penal Code §647 (amended).

SB 134 (Johnson); STATS 1977, Ch 426

Support: California District Attorneys' Association; California Highway Patrol; California Peace Officers' Association

Prior to the enactment of Chapter 426, it was unclear whether it was unlawful to sit or sleep in an unlocked vehicle without the owner's or possessor's permission, or to commit some other act of trespass in a vehicle [See CAL. STATS. 1971, c. 1581, §1 at 3188; CAL. VEH. CODE §§10852, 10853]. Chapter 426 amends the provision of Section 647 of the Penal Code that relates to lodging in buildings, and provides that, in addition, lodging in any *vehicle* without the permission of the owner or the person entitled to possession is disorderly conduct, which is punishable as a misdemeanor [CAL. PENAL CODE §647(i)]. The term "vehicle" apparently includes such things as buses, motor trucks, passenger vehicles, trailers and trolley coaches [See CAL. VEH. CODE §§233, 410, 415, 465, 630, 650, 670] and apparently excludes such devices as trains, cable cars, [See CAL. VEH. CODE §670] and airplanes [12 OP. ATT'Y GEN. 28, 32 (1948)].

Lodging in a building or place without the consent of the owner, or one entitled to possession or in control thereof, may be illustrated by a person sleeping in an apartment without permission of the tenant [People v. Lyons, 18 Cal. App. 3d 760, 773, 96 Cal. Rptr. 76, 85 (1971)]. Extending this definition to vehicles, it would now appear to be illegal to sleep in a vehicle without the owner's permission [See CAL. PENAL CODE §647(i)]. Whether a mere temporary occupation of a vehicle is covered by this new law depends on the definition of the term "lodge." The verb "lodge," in its normal usage, means to rest in a place or to rest or dwell for a time [WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1063 (unabridged 2nd ed. 1971)]. This definition would appear to be particularly applicable to vehicles as used in Section 647(i) in light of the fact that Chapter 426 apparently was introduced in response to a Butte County Municipal Court case involving an inebriated person entering and sitting in an unlocked car and searching through the glove compartment for a match to light his cigarette [See People

v. Lewis, CR 1909 (Chico Mun. Ct. Dec. 1, 1976); *see also* letter from Judge A. Houghton, Chico Mun. Ct., Chico, Cal. to State Senator R. Johnson, 1st Senatorial District, Cal., December 15, 1976 (copy on file at the *Pacific Law Journal*). Thus, Chapter 426 appears to extend a criminal sanction to such a temporary trespass in a vehicle.

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See Generally:

- 1) 2 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Public Peace and Welfare* §617 (loitering and trespassing) (Supp. 1975).

## Crimes; hit and run skiing

Penal Code §653i (new); §602 (amended).

AB 956 (Waters); STATS 1977, Ch 870

Support: Sierra Ski Areas' Association

Prior to the enactment of Chapter 870, there apparently was no law making it illegal to leave the scene of a skiing accident. Chapter 870 adds Section 653i to the Penal Code to make it an infraction for a person who is involved in a skiing accident to leave the scene of the accident if he or she knows or has reason to believe that anyone else involved in the accident is in need of medical and other assistance, except to notify the proper authorities or to obtain assistance [CAL. PENAL CODE §653i]. In addition, Chapter 870 amends Section 602 of the Penal Code to make it a misdemeanor to willfully commit a trespass by knowingly skiing in an area, or on a ski trail, that is closed to the public and on which signs have been posted to indicate such closure [CAL. PENAL CODE §602(q)]. Punishment for violation of Section 653i (hit and run skiing) is a fine not to exceed \$1,000, whereas punishment for violation of Section 602(q) (misdemeanor trespass) is imprisonment in a county jail for not more than six months or a fine not greater than \$500 or both [See CAL. PENAL CODE §§19, 602(q)].

Inasmuch as the language and apparent purpose of Section 653i, concerning hit and run skiing, are similar to the language and purpose of the Vehicle Code section governing hit and run driving [*Compare* CAL. PENAL CODE §653i *with* CAL. VEH. CODE §20001], reference to the latter may prove helpful in defining the terms used in Section 653i. By way of analogy, it would appear that in addition to the normal involvement in a skiing accident by means of personal contact in a collision, a person may be "involved" in such an accident if he or she forces another into a position of danger or is instrumental in causing the accident (*Cf.* *People v. Bammes*, 265 Cal. App. 2d 626, 631, 71 Cal. Rptr. 415, 419 (1968) (involvement in a hit and run driving accident); *People v. Sell*, 96 Cal. App. 2d 521, 523-24, 215 P.2d 771, 772 (1950) (involvement in a hit and run driving accident)]. Further, Section 653i expressly requires that the defendant have knowledge of a need

for aid, or reason to believe it is needed. Again, by way of comparison to the Vehicle Code, it would appear reasonable to infer that violation of Section 653i would require that a defendant have *actual* knowledge of personal injury to another resulting from the accident or *constructive* knowledge of such injury from the fact that the personal injury was visible and obvious or that the accident was so serious that a reasonable person would assume that there must have been resulting injuries [*Compare* CAL. PENAL CODE §653i with CAL. VEH. CODE §20001 and *People v. Carter*, 243 Cal. App. 2d 239, 241, 52 Cal. Rptr. 207, 208 (1966)]. Thus, Section 653i of the Penal Code apparently makes it illegal for a person who collides with another skier or is instrumental in causing another to have a skiing accident, to leave the scene of this accident if such a person has actual or constructive knowledge that an individual has sustained personal injury as a result of the incident.

With reference to the language of Section 602(q), making it illegal to willfully commit a trespass by knowingly skiing in an area marked as closed, the term "knowingly skiing" appears to require only that the defendant had knowledge that the area or trail on which he or she was skiing was closed to the public and does not require any knowledge of the unlawfulness of such an act [*See* CAL. PENAL CODE §§7, 602(q)]. Thus, it would appear that a violation of Section 602(q) of the Penal Code would require a showing that a sign prohibiting skiing on the trail was clearly positioned, that the defendant saw the sign, understood that the area was closed to the public, and that he or she then proceeded to ski there anyway [*See* CAL. PENAL CODE §602(q)].

Enforcement of either Section 653i or 602(q) may prove difficult inasmuch as police do not patrol the ski slopes. Nevertheless, Chapter 870 appears to take steps toward requiring reasonable conduct by skiers on the slopes when they are involved in an accident, and attempts to provide a deterrent to skiing on trails marked as closed [*See* CAL PENAL CODE §§602, 653i].

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See Generally:

- 1) 2 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Public Peace and Welfare* §646 (involvement in an accident), §650 (knowledge) (1963); §646 (involvement in an accident), §650 (knowledge) (Supp. 1975).
- 2) Annot., 23 A.L.R. 3d 497 (knowledge of an accident) (1969).